Supreme Court, U.S.
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No. 90-1243

In The

Supreme Court of the United States

October Term, 1990

HUMPHREYS (CAYMAN) LIMITED,

Petitioner,

v.

DOROTHY A. WILSON AND LOUIE P. WILSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

PHILLIP A. TERRY
McHALE, COOK & WELCH, P.C.
320 North Meridian Street, #1100
Indianapolis, Indiana 46204
(317) 634-7588
(Counsel of Record)

ALFRED H. KRECKMAN, JR.
MASSEY, ANDERSON & GIBSON
908 N. Main Street
Post Office Box 1030
Paris, Illinois 61944
(217) 465-7595
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a foreign corporation that operates a hotel in another country and which has since at least 1976 established a continuing commercial, contractual relationship with an Indiana tour company for the purpose of obtaining business from Indiana for its hotel, may, consistently with due process, be required to defend in Indiana an action brought by a guest of the hotel for injuries suffered in the hotel, where the guest made reservations at the hotel in Indiana through the Indiana tour company as a result of the petitioner's promotional efforts?

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STATEMENT OF THE CASE

Petitioner, Humphreys (Cayman) Limited, is incorporated under the laws of the Cayman Islands. It is a licensee of Holiday Inns, Inc. and operates a hotel in the Cayman Islands under authority of that license. Petitioner maintains a corporate office in Memphis, Tennessee and has operated a reservations office in Miami, Florida. App. 2a. (All references are to the appendix contained in the Petition for Writ of Certiorari.)

Since 1976, petitioner has participated in a continuing commercial relationship with American Trans Air (American) to provide accommodations for tours run by American to the Cayman Islands. App. 2a. American is a travel club and tour operator incorporated under the laws of the State of Indiana and has its principal place of business in Indiana. App. 21a.

As part of its relationship with American, petitioner sent officers to Indianapolis, Indiana to meet with representatives of American. During a trip to Indiana in the summer of 1981, petitioner's representatives negotiated a long-term contract with American by which a certain number of rooms at petitioner's hotel would be guaranteed at a reduced rate for American-run tours, with American tour leaders receiving free accommodations. App. 2a-3a.

Contracts between American and petitioner have been negotiated periodically, usually a year in advance. The contracts include negotiated rates, guaranteed room availability, minimum numbers of guests for petitioner's hotel, commission rates payable to American or net rates

for rooms to be charged to American, and free accommodations available to American personnel accompanying a tour. App. 22a.

American frequently has listed trips to the Cayman Islands in its regular advertising brochures and has included specific references to petitioner's hotel. App. 3a. Since 1978, advertisements for 131 tours specifically offering accommodations at petitioner's Holiday Inn have been published in American's travel bulletins, and tours to the Cayman Islands are offered by American as frequently as two or three times a month. In addition to including specific advertisements of petitioner's hotel in the tour listing, separate advertisements for the Cayman Islands tours which include solicitation of accommodations at petitioner's hotel are also published in American's travel bulletins. American obtains information for these advertisements of petitioner's Holiday Inn from brochures furnished by petitioner. The advertisements are made with petitioner's knowledge and encouragement. App. 22a.

Petitioner advertises extensively in national magazines directed both at travel agents and potential travelers. In addition, petitioner mails brochures and rate cards to travel agents generally, and has mailed such material to American and its subsidiary, Ambassadair, knowing that it would be circulated to Ambassadair's membership. App. 3a, 22a-23a.

Petitioner concedes that "it is probable that some or all of these advertisements, listings and related materials were sent or made available to persons or entities in

Indiana". App. 23a. Petitioner also advertises in newspapers, some of which, such as the Chicago Tribune, petitioner concedes "were probably seen in Indiana by Indiana subscribers to those newspapers." Petitioner maintains nationwide toll free numbers to be used by residents of Indiana and other states for the purpose of making reservations. All of these promotional activities are done purposefully by petitioner to obtain business for its hotel. "Through its advertising and promotional activities, [petitioner] obviously encourages the intermediaries to place reservations on their own behalf or on behalf of their clients with [petitioner's] hotel." App. 23a. Records produced by petitioner include checks issued by Ambassadair between December 21, 1982 and March 25, 1986, totalling $239,810.76. App. 23a.

Respondents participated in a tour organized by American that left Indianapolis International Airport on October 28, 1984. The group stayed at petitioner's hotel in the Cayman Islands. Arrangements for the trip were made as a result of advertisements for the tour that appeared in American's travel bulletin. App. 3a. Both the tour listing and the advertisement for the Cayman Island trip included references to accommodations at petitioner's Holiday Inn. App. 23a. Arrangements were made with American's tour subsidiary, Ambassadair, and payment was made to Ambassadair in Indianapolis, Indiana. App. 3a.

At page 2 of the Petition, it is stated that "American, however, did not act as an agent for petitioner; American had no authority to bind petitioner and it did not purport to do so." This statement is taken from the dissenting opinion of Judge Will. App. 14a-15a. Petitioner did not

contest any finding of fact by the District Court and there is no finding of fact by the District Court or in the majority opinion of the Appellate Court to support this statement.

On the facts found by the District Court and the Appellate Court, American had authority pursuant to its contracts with petitioner to accept reservations in Indiana for rooms which petitioner had guaranteed would be available for American's tour group members, and indeed the contract required American to obtain reservations for a minimum number of rooms at the petitioner's hotel. App. 2a-3a, 22a-23a. The District Court specifically found that the respondents' reservations at petitioner's hotel had been "made in Indiana." App. 36a, 40a.

Based on the foregoing findings, the District Court held that exercise of specific, personal jurisdiction over petitioner was consistent with due process because petitioner "had an ongoing beneficial relationship with a forum travel club. Its representatives came to Indiana on occasion to negotiate business with the Indiana travel club. Reservations were made in Indiana. Extensive advertisement of more than just the national magazine and high circulation newspaper variety is present. Specifically, forum directed advertisement in a forum based newsletter is present." App. 36a.

The Appellate Court affirmed, finding that "The conduct engaged in by [petitioner] in Indiana is certainly sufficient to satisfy specific jurisdiction. [Petitioner] advertised in the state of Indiana, entered into a long-term arrangement with an Indiana corporation to provide a guaranteed number of rooms to be used in connection

with tour packages that departed from Indiana, and sent representatives to Indiana to negotiate the contract. In short, [petitioner] established a continuing commercial relationship with an Indiana tour company with the expectation that its service (providing accommodation) would be purchased by residents of Indiana (and other states). . . . [Petitioner], by its own business conduct, had purposefully availed itself 'of the privilege of conducting activities within the forum State, thus, invoking the benefits and protections of its laws.' (Citation omitted.) It should have 'reasonably anticipate[d] being haled into court there.' (Citation omitted.)." App. 8a-9a.

SUMMARY

The petition for writ of certiorari should be denied because the petitioner's purposeful and continuous commercial contacts with Indiana are amply sufficient to permit the exercise and specific personal jurisdiction over the petitioner by the United States District Court for the Southern District of Indiana pursuant to Indiana Trial Rule 4.4 consistent with the Due Process Clause of the Fourteenth Amendment as interpreted and applied by prior decisions of this Court.

The facts establish that petitioner has purposefully availed itself of the privilege of conducting business activities in Indiana. For more than a decade, petitioner has continuously engaged in a systematic promotional effort in Indiana which specifically targeted the Indiana tourist market and even more particularly targeted the market served by American Trans Air, an Indianapolis

based travel club and tour operator. Petitioner's efforts included visits to Indiana by petitioner's officers to negotiate long-term contracts with American pursuant to which American, among other things and in exchange for commissions and free accommodations for its tour guides, agreed to fill minimum numbers of rooms at petitioner's hotel, which petitioner in turn guaranteed it would provide at a specific rate.

Petitioner knowingly encouraged promotion of its hotel by American. Petitioner provided the information based upon which American prepared the ads and also provided rate cards and brochures for redistribution by American to its members. Petitioner guaranteed the availability of a minimum number of rooms for American's tour groups so that accommodations at its hotel could be included as part of American's tour package. Respondents' reservation of accommodations at petitioner's hotel resulted directly from the advertisements for the hotel published with petitioner's knowledge and encouragement in an American tour bulletin and because of the inclusion of petitioner's hotel in the tour's ground package.

The respondents made and paid for their reservations in Indiana. The innkeeper-guest relationship which was thus formed between the respondents and the petitioner, and out of which respondents' claims arise, was the specific type of business transaction which petitioner purposefully solicited through its advertising and contracts with American in Indiana.

Further, the petitioner has presented no substantial reason for review by this Court. The petitioner has not

argued that the decision of the Seventh Circuit is in conflict with a decision of another United States court of appeals or a state court of last resort, nor has it argued that the Seventh Circuit has departed from the accepted and usual course of judicial proceedings. Neither has petitioner argued that the Seventh Circuit has in this case decided an important question of federal law which has not been settled by this Court or that its decision conflicts with applicable decisions of this Court.

Petitioner relies on this Court's grant of certiorari in *Carnival Cruise Lines, Inc. v. Shute*, No. 89-1647 as the basis for its petition. However, the petitioner's purposeful contacts with Indiana in this case are well within the due process requirements previously established by this Court for the exercise of specific personal jurisdiction over a nonresident defendant. Accordingly, even if this Court holds that Carnival Cruise Lines' contacts with the State of Washington are not sufficient to meet the jurisdictional requirements of the Due Process Clause, such a decision would have no necessary impact on the Seventh Circuit's decision upholding jurisdiction over petitioner in this case.

ARGUMENT

I. EXERCISE OF PERSONAL JURISDICTION OVER THE PETITIONER IN INDIANA IS CONSISTENT WITH DUE PROCESS

The United States District Court for the Southern District of Indiana held that the petitioner's purposefully established contacts with the State of Indiana were sufficient to subject the petitioner to personal jurisdiction in

Indiana with regard to the respondents' claims, consistent with the requirements of the Due Process Clause. A majority of the Seventh Circuit affirmed, holding that "[Petitioner], by its own business conduct, had purposefully availed itself 'of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' (Citation omitted.) It should have 'reasonably anticipate[d] being haled into court there.' (Citation omitted.)."

This Court has already clearly delineated the requirements of the Due Process Clause which must be met in order for a defendant to be subject to specific personal jurisdiction in a forum of which it is not a resident. The defendant must itself establish minimum contacts in the forum State by "some act [through] which [it] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). "[T]he defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). The requirement that the defendant have "fair warning" that its activities may subject it to the jurisdiction of the forum State "is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. [770, 774], 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that 'arise out of or relate to' those activities, *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. [408, 414], 104 S.Ct. 1868, 1872,

80 L.Ed.2d 404 (1984)." *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985).

Jurisdiction cannot be predicated solely on "random," "fortuitous," or "attenuated" contacts. "Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State. *McGee v. International Life Insurance Co., supra*, 355 U.S., at 223, 78 S.Ct., at 201; see also *Kulko v. California Superior Court, supra*, 436 U.S., at 94, n.7, 98 S.Ct., at 1698, n.7. Thus where the defendant 'deliberately' has engaged in significant activities within a State, *Keeton v. Hustler Magazine, Inc.*, 465 U.S., at [781], 104 S.Ct., at [148], or has created 'continuing obligations' between himself and residents of the forum, *Travelers Health Assn. v. Virginia*, 339 U.S., at 648, 70 S.Ct., at 929, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." (Emphasis in original; footnote omitted). *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 475-476, 105 S.Ct. 2174, 2183-2184, 85 L.Ed.2d 528 (1985).

In *Asahi Metal Industry Co., Ltd. v. Super. Ct. of Cal., Solano Cty.*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the Court identified the following factors as indicia of an intent or purpose of the defendant to serve the market of the forum State: "designing the product for the market in the forum State, advertising in the forum State,

establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi Metal Industry Co., Ltd., supra,* 480 U.S., at 112, 107 S.Ct., at 1032.

As the District Court found, many if not all of these factors are present in this case, in addition to the physical presence of petitioner's officers in Indiana for the purpose of negotiating contracts with American, thus supporting the conclusion that petitioner has indeed purposefully availed itself of the privilege of conducting part of its general business activities in Indiana with the specific purpose of serving the Indiana market.

Applying the jurisdictional principles already established by this Court to the facts regarding petitioner's activities which have been directed to the State of Indiana, it is clear that the exercise of jurisdiction in this case is proper. Since at least 1976, petitioner has undertaken a systematic and deliberate attempt to target the Indiana market. As a direct result of its efforts, residents of Indiana (and Illinois) have stayed at petitioner's hotel in the Cayman Islands through the tours conducted by American. Not only has petitioner mailed brochures and other advertising matter to American and other Indiana residents, it also acknowledges that it has placed advertisements in newspapers which are circulated to Indiana subscribers and has mailed brochures to American knowing that American intended to redistribute those brochures to its members. Beyond this, there has been a constant flow of correspondence and contract documents over a period of more than a decade between petitioner

and American, and perhaps most importantly, representatives of petitioner, including an executive vice-president and two other officers, have been in Indiana on several occasions for the express purpose of negotiating tour packages with American.

In addition, petitioner and American have regularly entered into long-term contracts for the booking of tour groups in connection with which petitioner guarantees blocks of rooms for American's tours. The facts discovered thus far reveal that as a result of all these activities directed by petitioner at the Indiana market, petitioner has received almost $240,000.00 just during the period from December, 1982 to March, 1986, from American tours originating in Indiana, including the tour of which respondents were members.

There is a substantial nexus between the petitioner's deliberate activities directed toward Indiana and the respondents' claims in this case. The respondents' claims against petitioner arise out of the innkeeper-guest relationship with petitioner which was established in Indianapolis, Indiana and was the specific type of business transaction which petitioner sought to obtain through its advertising and contracts with American in Indiana. The fact that respondents are not citizens of Indiana is not critical to the issue of jurisdiction over petitioner. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), explicitly held that the "plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Keeton, supra*, 465 U.S. at 780, 104 S.Ct. at 1481.

The strong relationship between the petitioner, the forum and the litigation provides a firm foundation for personal jurisdiction over petitioner in this case. The petitioner, having purposefully derived benefits from its activities in Indiana, cannot readily wield the Due Process Clause "as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King Corporation v. Rudzewicz, supra,* 471 U.S. at 474, 105 S.Ct. at 2183. "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corporation v. Rudzewicz, supra,* 471 U.S. at 477, 105 S.Ct., at 2184-2185. This petitioner has not done.

II. THE PETITIONER HAS PRESENTED NO SUBSTANTIAL REASON FOR REVIEW BY THIS COURT OF THE SEVENTH CIRCUIT'S DECISION UPHOLDING JURISDICTION OVER PETITIONER.

Supreme Court Rule 10 provides that "a writ of certiorari will be granted only when there are special and important reasons therefor." As argued above, the exercise of specific personal jurisdiction over petitioner in this case is well within the ambit of prior decisions of this Court. No other argument has been made by petitioner which would warrant the exercise of this Court's discretion to grant the petition.

The decision of the Seventh Circuit in this case is not in conflict with a decision of another United States court of appeals or a state court of last resort, nor has the

Seventh Circuit departed from the accepted and usual course of judicial proceedings. Further, the requirements of the Due Process Clause which govern the issue presented by the petition have been well settled by this Court and the decision of the Seventh Circuit is in accord with those requirements.

Petitioner relies heavily on this Court's grant of certiorari in *Carnival Cruise Lines, Inc. v. Shute*, No. 89-1647 as the basis for its petition. However, as demonstrated above, the petitioner's purposeful contacts with Indiana in this case are well within the due process requirements previously established by this Court for the exercise of specific personal jurisdiction over a nonresident defendant. Accordingly, even if this Court holds that Carnival Cruise Lines' contacts with the State of Washington are not sufficient to meet the jurisdictional requirements of the Due Process Clause, such a decision would have no necessary impact on the Seventh Circuit's decision upholding jurisdiction over petitioner in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PHILLIP A. TERRY
McHALE, COOK & WELCH, P.C.
320 North Meridian Street, #1100
Indianapolis, Indiana 46204
(317) 634-7588
(Counsel of Record)

ALFRED H. KRECKMAN, JR.
MASSEY, ANDERSON & GIBSON
908 North Main Street
Post Office Box 1030
Paris, Illinois 61944
(217) 465-7595
Attorney for Respondents